United States Small Business Administration
Office of Hearings and Appeals

SIZE APPEAL OF:	
DCS Night Vision JV, LLC.	SBA No. SIZ-4997
Appellant	Decided: September 12, 2008
Appealed from Size Determination Nos. 02-2008-69 & 02-2008-78	

APPEARANCES

John R. Tolle, Esq., Barton, Baker, McMahon & Tolle, McLean, Virginia, for Appellant.

Lee P. Curtis, Esq., and Troy E. Hughes, Esq., Perkins Coie LLP, Washington, D.C., for Fibertek, Inc.

DECISION

PENDER, Administrative Judge:

I. Introduction and Jurisdiction

This appeal arises from a July 23, 2008 size determination (02-2008-69 & 02-2008-78) finding DCS Night Vision JV, LLC (Appellant) not to be a small business for a 500 employee size standard. The size determination arose from protests filed by the Contracting Officer (CO) and Fibertek, Inc. (Fibertek). For the reasons discussed below, the size determination is affirmed.

The Small Business Administration (SBA) Office of Hearings and Appeals (OHA) decides size appeals under the Small Business Act of 1958, 15 U.S.C. § 631 *et seq.*, and 13 C.F.R. Parts 121 and 134. Accordingly, this matter is properly before OHA for decision.

II. Issues

Whether the Area Office made a clear error of law or fact in determining Appellant was not entitled to a mentor-protégé joint venture agreement affiliation exemption under 13 C.F.R. § 121.103(h)(3)(iii).

Whether OHA should find SBA granted a request to extend the underlying Mentor-Protégé Agreement based upon SBA's allegedly misleading conduct.

Whether SBA's delay in approving the underlying Mentor-Protégé Agreement should receive the same due process as a termination of 8(a) status.

III. Background

A. Findings of Fact

1. On October 24, 2007, the U.S. Army Communications and Electronics Command (CECOM) issued RFP W15P7T-08-R-P401 (RFP). The purpose of the RFP is to acquire Sensor Technology Support to the Night Vision and Electronic Sensors Directorate (NVESD) of the RDECOM Communications Electronics Research, Development and Engineering Center (CERDEC). The RFP: (1) Established November 26, 2007 as the due date for proposals; (2) Totally set-aside the procurement for small businesses; and (3) Assigned the procurement North American Industry Classification System (NAICS) code 541712, Research and Development in the Physical, Engineering, and Life Sciences, with a size standard of 500 employees.

2. Appellant submitted its offer under the RFP, including price on November 26, 2007.

3. On April 4, 2008, the Source Selection Authority determined Appellant should be awarded the contract arising from the RFP, contingent that Appellant was an eligible small business under the applicable size standard. On April 4, 2008, the Contracting Officer (CO) required Appellant to confirm its size eligibility.

4. On April 7, 2008, Appellant replied to the CO's April 4, 2008 letter and stated Appellant was formed as a joint venture under the Small Business Administration's Mentor-Protégé Program between Advanced Systems Technology and Management, Inc. (ASTM), an 8(a) concern, and DCS Corporation (DCS).

5. On April 9, 2008, the CO requested SBA's Office of Government Contracting, Area Office II (Area Office) conduct a formal size determination of Appellant. Specifically, the CO requested the Area Office "confirm whether or not [Appellant] qualifies to receive a small business set-aside award, under the Small Business Administration's Mentor-Protégé Program between an 8(a) and a large business."

6. On April 11, 2008, the CO informed the other offerors, including Fibertek, of his intent to award the contract arising under the RFP to Appellant. The CO further informed the offerors: (1) of Appellant's composition; (2) that Appellant claimed eligibility for award under the Mentor-Protégé Program; and (3) that SBA was performing a size determination of Appellant.

7. On April 15, 2008, the Area Office informed Appellant of the CO's protest. The Area Office explained the CO's concerns and requested Appellant reply to these concerns, including providing relevant evidence within three working days after receipt of the letter. Among other documents, the Area Office also required Appellant to: "Provide complete copies of applicable SBA Mentor-Protégé Agreements with the most recent approval from SBA."

8. On April 16, 2008, Fibertek forwarded a letter to the CO stating its concern that Appellant is not an eligible small business because ASTM and DCS do not appear on the list of approved mentors or protégés on SBA's website. Fibertek asserted that DCS exceeded the employee size standard and that an approved mentor-protégé agreement did not exist between DCS and ASTM. The CO forwarded Fibertek's letter to the Area Office on April 16, 2008.

9. On April 17, 2008, the Area Office forwarded a copy of Fibertek's April 16, 2008 letter to Appellant and requested Appellant provide a response to the allegations contained in Fibertek's letter. The Area Office instructed Appellant to provide its response with its submission to the Area Office's April 15, 2008 request.

10. Appellant responded to the Area Office's April 15, 2008 letter on April 21, 2008. Appellant detailed the events surrounding its request for renewal of the Mentor-Protégé Agreement between DCS and ASTM, which started in July of 2007. In this letter Appellant admitted the Mentor-Protégé Agreement expired on November 15, 2007. Appellant contended that since SBA did not inform Appellant its renewal request had been approved or denied, it "assumed" its request had been granted and that SBA should thus determine the SBA had granted its request.

11. As of November 26, 2007, SBA had not approved the renewal of the Mentor-Protégé Agreement between DCS and ASTM.

B. The Size Determination

On July 23, 2008, the Area Office issued Size Determination No. 2-2008-69 & 78 (size determination). The Area Office determined Appellant was other than small for the procurement.

The Area Office summarized the protests from the CO and Fibertek. Then the Area Office reviewed the available evidence and noted Appellant was a joint venture arising between DCS and ASTM, an 8(a) concern. The Area Office also explained that while ASTM had less than 500 employees, DCS had over 500 employees and would be considered other than a small business under the applicable size standard.

The Area Office also reviewed the arguments made by Appellant in its April 21, 2008 letter concerning SBA's lack of response concerning the continuation of the Mentor-Protégé Agreement. The Area Office noted Appellant never received a direct answer concerning the continuation of its Mentor-Protégé Agreement. The Area Office explained it performed no review of either the joint venture or the Mentor-Protégé Agreement. Instead, the Area Office determined whether Appellant had complied with the exception to affiliation provisions of

13 C.F.R. § 121.103(h)(3)(iii), which requires SBA to approve a Mentor-Protégé Agreement before any resulting joint venture between an 8(a) concern and a non-8(a) concern can qualify as a small concern.

The Area Office noted that its review of the size protest was confined by two OHA decisions. The first, *Size Appeal of SES-Tech Global Solutions*, SBA No. SIZ-4951 (2008) (*SES-Tech*), held area offices may not review joint venture agreements for non-8(a) procurements. The second *Size Appeal of White Hawk/Todd, A Joint Venture*, SBA No. SIZ-4950 (2008)(*White Hawk*), held that area offices may not review mentor-protégé eligibility issues. Accordingly, the Area Office explained that it would do neither. Instead, the Area Office limited itself to determining whether SBA had approved the Mentor-Protégé Agreement between DCS and ASTM as of the date Appellant submitted its offer under the RFP.[1] The Area Office found that SBA had not approved the Mentor-Protégé Agreement between DCS and ASTM and, accordingly, found Appellant was not subject to exemption from affiliation.

C. The Appeal

1. Motion to Admit New Evidence

On August 7, 2008, Appellant filed its appeal and a Motion for Admission of New Evidence (Motion). Appellant's Motion alleges that pursuant to 13 C.F.R. § 134.308(a), there is good cause to consider evidence not previously submitted to the Area Office. Moreover, Appellant argues the new evidence is necessary for OHA to decide the case.

In general, the evidence Appellant offers (Exhibits A - N) involves the approval/review process for the renewal of the Mentor-Protégé Agreement between DCS and ASTM that Appellant submitted to SBA in July of 2007 and SBA's subsequent handling of Appellant's renewal request. Further, some of the evidence Appellant offers (Exhibits G - N) consists of matters that occurred after November 26, 2007, with only one exhibit (G) having been created between November 26, 2007 and the CO's protest (April 11, 2008).

Appellant claims it would have provided the evidence it now seeks to admit to the Area Office if it knew the evidence was relevant. Appellant claims it did not know the SBA had not reviewed its Mentor-Protégé Agreement until it received the size determination and thus could not have known what proof was relevant.

2. Substance of the Appeal

Appellant grounds its appeal on the premise that Fibertek's protest concerned the validity of its Mentor-Protégé Agreement (Appeal at 2). Appellant states it presumed the Mentor-Protégé Agreement was approved for continuation since Appellant had not received indication of its discontinuance (Appeal at 3). Appellant also notes the Area Office stated it did not review either the joint venture or the Mentor-Protégé Agreements between DCA and ASTM.

[1] I note the Area Office shows the relevant date to be November 25, 2007. The Record indicates the correct date should be November 26, 2007. This one day difference is not material.

Appellant alleges the Area Office incorrectly attempted to distinguish relevant case law. Specifically, Appellant alleges that when the Area Office said it was permitted to ascertain the existence of an approved mentor-protégé agreement under *White Hawk* the Area Office erred.

Appellant alleges that since *White Hawk* forbids area offices from reviewing the eligibility of those entering into an SBA approved mentor-protégé agreement in making a size determination, the Area Office could not determine whether DCS and ASTM actually had an SBA approved mentor-protégé agreement in making the size determination. In consequence, Appellant argues that OHA should find the Area Office did not have the authority to determine Appellant was other than small for this procurement.

After arguing the applicability of *White Hawk*, Appellant reviewed, at length, the issues it had with SBA concerning approval or renewal of its Mentor-Protégé Agreement. Basically, Appellant explained that it approached SBA about the status of its Mentor-Protégé Agreement in July of 2007. SBA explained what information it required to make a decision to continue or renew Appellant's Mentor Protégé Agreement. Appellant submitted the material required by SBA to make its decision by July 19, 2007. SBA informed Appellant it would process its request in the order received and keep Appellant up-to-date on its status.

Appellant explained it had not heard anything from SBA by October 26, 2007 and it requested information on the status of its request for an extension of the Mentor-Protégé Agreement between DCA and ASTM. Appellant received no feedback from SBA until early 2008. Still later, in May of 2008, Appellant pressed the issue of an extension of its Mentor-Protégé Agreement with SBA again. There was further discussion and communication concerning this issue between Appellant and SBA between May and June of 2008.

Appellant states that SBA never informed Appellant that its request for renewal had been denied and so Appellant acted as if the agreement had been renewed. Accordingly, Appellant "assumed" that SBA had granted its request for a renewal of its Mentor-Protégé Agreement.

Appellant argues that based upon SBA's conduct during the renewal process, OHA should find SBA's conduct to be profoundly disturbing and find that SBA granted the request for an extension. Appellant argues it was misled as to whether SBA was actually reviewing its request for renewal and thus did not furnish required information to the Area Office. Appellant alleges it is the implicit obligation of SBA to timely "review and approve" a mentor-protégé relationship and not mislead participants. Thus, SBA should be held accountable for its failure to timely act and Appellant cites cases that it represents support its request.

Alternatively, Appellant argues ASTM should receive the same due process it would receive for termination of a participant from the 8(a) business development program "when SBA intends not to extend the term of a mentor-protégé arrangement." (Appeal, at 11). Appellant argues that this remedy is needed to "safeguard against SBA doing what it has tried to do to ASTM here concerning [the Mentor-Protégé Agreement]." Appellant argues if SBA does not give a protégé an "adequate opportunity to address the concerns the SBA has concerning

extension of a [mentor-protégé agreement], OHA should find that SBA has, in effect, extended the MP agreement." (Appeal, at 11).

D. Fibertek's Response

On August 22, 2008, Fibertek filed its response to the appeal and a Motion in Opposition of Admission of New Evidence.

1. Opposition to New Evidence

Fibertek discussed OHA case law applicable to the introduction of new evidence. Fibertek emphasized that if new evidence was at the heart of the appeal and OHA admitted that evidence, it would defeat any claim for error by the Area Office. Instead, Fibertek asserts OHA would have to remand the matter for consideration of that evidence. *Size Appeal of E.D. Etnyre & Co.*, SBA No. SIZ-4596 (2003).

Fibertek challenges Appellant's factual contention that Appellant was unaware its Mentor-Protégé Agreement was not approved. Fibertek asserts the Record and the size determination contradict this assertion and Appellant knew or should have known its request for an extension had not been approved. In support of this assertion Fibertek notes that its protest specifically asserted there was no listing of an approved mentor-protégé agreement for DCS or ASTM on SBA's website.

Fibertek also challenges the relevancy of Appellant's exhibits. Fibertek asserts the bottom line issue is whether Appellant had an approved mentor-protégé agreement in effect when Appellant submitted its offer. Yet, Appellant now seeks to introduce numerous exhibits that post date the submission of its offer (Exhibits G-N). Fibertek avers these exhibits are not relevant to the seminal issue of the appeal and will unduly enlarge the scope of the case.

2. Response to Appeal

Fibertek asserts Appellant has incorrectly presented the holding in *White Hawk*. Fibertek states OHA held that area offices and OHA lack jurisdiction to consider protests where compliance with SBA's mentor-protégé regulation is at issue and neither can play a role in the approval or review of mentor-protégé agreements. Thus, Fibertek argues *White Hawk* has nothing to do with determining whether an approved mentor-protégé agreement actually exists.

Fibertek notes the Area Office "went out of its way" to explain that it was "not ascertaining the validity of the JV agreement and/or any other eligibility issue with the MP agreement," but was "merely ascertaining the existence of an approved SBA MPA agreement" between DCS and ASTM at the time of the initial offer. Fibertek asserts the Area Office was not restricted from taking this action and Appellant's contention regarding the Area Office's jurisdiction is wrong.

Fibertek also takes a different view of the facts concerning the renewal of Appellant's Mentor-Protégé Agreement. Fibertek asserts Appellant "fell asleep at the wheel" and failed to

obtain timely approval of its request for an extension before it submitted its offer. Fibertek cites *Size Appeal of Jacob-Reliable Enterprises*, SBA No. SIZ-4836 (2007), as having similarities with the facts of this appeal. Fibertek alleges the facts indicate ASTM knew its request for an extension of the Mentor-Protégé Agreement had not been granted when it submitted its offer and that Appellant's Mentor-Protégé Agreement was not in effect.

Finally, Fibertek opposes Appellant's due process argument because it lacks regulatory or other legal basis. Fibertek points out that 13 C.F.R. § 124.304 addresses procedural steps before termination an 8(a) participant's status, while 13 C.F.R. § 124.520, which addresses mentor-protégé agreements, contains no notice or similar "due process" requirements.

IV. Discussion

A. Timeliness

Appellant filed its appeal within 15 days of receiving the size determination. Thus, the appeal is timely. 13 C.F.R. § 134.304(a)(1).

B. Standard of Review

The standard of review for this appeal is whether the Area Office based its size determination upon clear error of fact or law. 13 C.F.R. § 134.314. In evaluating whether there is a clear error of fact or law, OHA does not consider Appellant's size *de novo*. Rather, OHA reviews the record to determine whether the Area Office based its size determination upon a clear error of fact or law. See *Size Appeal of Taylor Consultants, Inc.*, SBA No. SIZ-4775 (2006), for a full discussion of the clear error standard of review. Consequently, I will disturb the Area Office's size determination only if I have a definite and firm conviction the Area Office made key findings of law or fact that are mistaken.

C. The Merits

1. Appellant's Motion to Submit New Evidence

Appellant's Motion to Submit New Evidence has no merit. The evidence Appellant seeks to admit is irrelevant, and in part (Exhibits G - N), Appellant's proffer consists of evidence concerning events happening after Appellant submitted its offer and certified its size. Such evidence never can be considered upon appeal because area offices decide a concern's size as of the date it submitted its offer including price. 13 C.F.R. § 121.404(a).

Appellant certainly knew the nature of the size protest. First, the Area Office provided Appellant with Fibertek's protest, which alleges Appellant did not have an approved Mentor-Protégé Agreement (Facts 8 and 9). Secondly, in Appellant's April 21, 2008 protest response to the Area Office, Appellant made many of the same arguments it makes in the instant appeal (Fact 10). This means Appellant knew the status of the Mentor-Protégé Agreement was critical. Consequently, Appellant has no excuse for not submitting the evidence that it now

wants OHA to consider to the Area Office so the Area Office could consider it in deciding the protest.

2. Appellant Did Not Qualify for an Exception to SBA's Affiliation Regulations

The general rule is that firms submitting an offer on a particular procurement as a joint venture are affiliates with regard to that contract and their size will be aggregated for that procurement. 13 C.F.R. § 121.103(h)(2). However, two firms approved by SBA to be a mentor and protégé may form a joint venture for any Federal Government procurement. 13 C.F.R. § 121.103(h)(3)(iii) and their joint venture is exempt from the normal rules of affiliation. 13 C.F.R. § 121.103(b)(6), (h)(3)(iii) and *see also* 13 C.F.R. § 124.520. The exemption continues as long as the protégé concern qualifies as small for the size standard applicable to the contract. 13 C.F.R. § 121.103(h)(3)(iii). The assistance which a mentor extends to its protégé under an approved joint venture agreement cannot be relied upon to make a finding of affiliation. 13 C.F.R. §§ 121.103(b)(6) & 124.520(d)(4).

The exception created by 13 C.F.R. § 121.103(h)(3)(iii) presupposes the existence of a mentor-protégé agreement approved by the SBA. Under 13 C.F.R. § 121.404(a), the mentor-protégé agreement must be approved at the time the offeror submits its offer, including price. *Size Appeal of Medical and Occupational Services Alliance*, SBA No. SIZ-4989 (2008) (*MOSA*).

Appellant's approved Mentor-Protégé Agreement expired on November 15, 2007 (Fact 10). It is undisputed, that for whatever reason, SBA had not renewed Appellant's Mentor-Protégé Agreement as of November 26, 2007, the date Appellant submitted its initial offer, including price (Facts 2 and 11). Accordingly, Appellant was not eligible for the exception to affiliation detailed in 13 C.F.R. § 121.103(h)(3)(iii).

Appellant avers that under OHA's precedent in *White Hawk*, the Area Office had no right to review the existence of an approved mentor-protégé agreement between DCS and ASTM. Appellant alleges that by examining whether there was an approved mentor-protégé agreement, the Area Office was actually determining mentor-protégé agreement validity or eligibility. Appellant is wrong. First, *White Hawk* only addressed determining whether a mentor-protégé agreement was valid under 13 C.F.R. § 124.520. Secondly, in the context of a mentor-protégé agreement, the words "validity" and "eligibility," necessarily presuppose the existence of an approved agreement. Outside of determining whether there is an SBA approved mentor-protégé agreement as required by 13 C.F.R. § 121.103(h)(3)(iii), there is nothing for an area office to examine, for *White Hawk* holds an area office cannot examine whether an agreement is valid or the parties are eligible to enter into an agreement. Accordingly, consistent with *MOSA*, area offices have a duty to examine the record to determine if there actually is an approved mentor-protégé agreement at the time a joint venture submits its offer, including price.

3. SBA Did Not Approve Appellant's Mentor-Protégé Agreement

Even if I would admit all the evidence Appellant seeks to admit and interpreted the facts in a light most favorable to Appellant, I am still unaware of any law, regulation, or decision that affords me the jurisdiction, right, or power to deem that SBA had approved Appellant's Mentor-

Protégé Agreement as of November 26, 2007. Regardless, Appellant is asking me to decide an eligibility issue when *White Hawk* established I could not. This alone supports a refusal to deem the Mentor-Protégé Agreement as having been approved. The power to approve mentor-protégé agreements, and their renewals, is vested solely with SBA's Director, Office of Business Development. 13 C.F.R. § 124.520(e)(2). Accordingly, OHA has no right to engage in this process, regardless of the facts.

Third, the only relevant evidence that could cause a tribunal to declare the Mentor-Protégé Agreement was in effect would have to be dated before November 26, 2007, the date when Appellant submitted its offer, including price (Fact 2). I find the evidence of Record is not profoundly disturbing. In the light most favorable to Appellant, I find the Record shows that while SBA may have been somewhat dilatory that Appellant was equally at fault for not following up as the time grew near for the RFP. Therefore, even if I had the power to deem that SBA had approved the renewal of Appellant's Mentor-Protégé Agreement as of November 26, 2007, it would be an abuse of my discretion to so deem under the facts of this case.

4. Renewal of SBA's Approval of a Mentor-Protégé Agreement is Not Subject to the Same Due Process as Termination of 8(a) Status

Appellant argues that OHA should apply 8(a) termination due process standards found in 13 C.F.R. § 124.304 when SBA intends not to extend the term of a mentor-protégé agreement. While citing no regulatory or other legal support for its position, Appellant argues such a step is necessary to safeguard against what SBA has done in this case.

There is no support for Appellant's argument. Specifically, I find:

a. The 8(a) program regulations at 13 C.F.R. § 124.304 address procedural steps SBA must take before termination of an 8(a) participant's status. 13 C.F.R. § 124.304 makes no mention of mentor-protégé agreements. In contrast, 13 C.F.R. § 124.520, which does address mentor-protégé agreements, contains no requirements for notice or due process requirements; and

b. OHA's jurisdiction is detailed in 13 C.F.R. § 134.102. 13 C.F.R. § 134.102(j) applies to part 124, the 8(a) program, and it makes no mention of mentor-protégé appeals in its list of program determinations applicable to the 8(a) program. In addition, mentor-protégé agreements, unlike termination of 8(a) status, are not listed under SBA's Administrative Law Judge jurisdiction in 13 C.F.R. § 134.405(a)(1).

Therefore, I hold OHA cannot apply 8(a) termination due process standards found in 13 C.F.R. § 124.304 when SBA intends not to extend the term of a mentor-protégé agreement.

V. Conclusion

For the above reasons, the Area Office's size determination is AFFIRMED and Appellant's appeal is DENIED.

This is the final decision of the Small Business Administration. *See* 13 C.F.R. § 134.316(b).

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THOMAS B. PENDER
Administrative Judge